IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1879 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUNVANTLAL RATANCHAND

Versus

RAMESHBHAI P PATEL

Appearance:

MR PV NANAVATI for Petitioners

MR MUKUND M DESAI for Respondent No. 1

UNSERVED-EXPIRED (N) for Respondent No. 2

DELETED for Respondent No. 3

RULE SERVED for Respondent No. 8

MR MK VAKHARIA for Respondent No. 13

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 13/09/2000

CAV JUDGEMENT

1 The plaintiffs-appellants have filed this First Appeal against the judgement and decree dated 31st January 1984 of Civil Judge (SD), Narol, partly dismissing the suit of the plaintiffs-appellants for specific performance of the agreement to sell but partly decreeing the suit of the plaintiffs-appellants against the defendants nos.8 to 12 directing them to refund the earnest money of Rs.20,000/- received by them from the plaintiffs with interest at the rate of 12% per annum from the date of the suit till realisation. The suit of the plaintiffs-appellants was dismissed against the defendants nos.1 to 7.

2 The brief facts giving rise to this appeal are as follows:-

3 Two plots bearing Nos.236/2 and 234/2 admeasuring 7986 sq. yards are situated in village Bodakdev, Taluka Dascroi, District Ahmedabad. These plots were owned by Parshottam Babarbhai Patel. These plots were undivided joint hindu family property. Defendants Nos.1 to 4 and deceased Parshottamdas Babarbhai Patel executed an agreement to sell in favour of the defendants nos.8 to 12 on 29.11.1971. Tweleve months' period was fixed for execution of the sale deed. Thus, the sale deed was to be executed by the defendants nos.1 to 4 and Parshottamdas Babarbhai Patel before 29.11.1972. On the basis of the aforesaid agreement to sell the defendants nos.8 to 12 in turn executed an agreement to sell in favour of the plaintiffs on 23.5.1972 and received Rs.20,000/- as earnest money from the plaintiffs. The time limit for the execution of the sale deed was fixed up to 20.11.1972. Under the terms and conditions of the agremeent to sell the defendants were required to produce title clearance and were to obtain necessary permission under Section 63 of the Bombay Tenancy Act. Another condition in the agreement to sell was that the defendants were to execute the sale deed in favour of the plaintiffs or any person as desired by the plaintiffs. On 17.11.1972 a supplementary agreement was executed by Parshottamdas Babarbhai Patel and the defendants nos.1 to 4 in favour of defendants nos.8 to 12. According to this agreement the time limit for execution of the sale deed was fixed as 3 months after cessation of Gujarat Vacant Land in Urban Areas Prohibition Alienation Act, 1972. Under the terms and conditions of the agreement the defendatns were required to produce title clearance and were to obtain necessary permission under Sec. 63 of the

Bombay Tenancy Act. Another condition in the agrement to sell was that the defendants were to execute the sale deed in favour of the plaintiffs or any person as desired by the plaintiffs. On 17.11.1972 a suppplementary agrement was executed by Parshottamdas Babarbhai and the defendants nos.1 to 4 in favour of defendants nos.8 to 12. According to this agreement the time limit for execution of the sale deed was fixed as 3 months after cessation of Gujarat Vacant Land in Urban Areas Prohibition Alienation Act, 1972. Similarly defendants nos.8 to 12 executed agreement in favour of plaintiffs and extended the period for execution of the sale deed to two months after the provisions of the said Act ceased to remain in force vide agreement dated 8.11.1972. The said Act ceased to remain in force with effect from 12.8.1975. In this way, time limit given under the agreement dated 23.5.1972 stood extended up to 12.10.1975. Parshottam Babarbhai Patel expired on 26.10.1973. The defendants nos.1 to 4 and 6 and 7 are children of said Parshottam Babarabhai Patel. The defendant no.5 was the wiow of Parshottamdas Babarbhai Patel. In this way, according to the plaintiffs the transaction entered into by Parshottamdas Babarbhai Patel is binding upon the defendants nos.1 to 7. After 12.8.1975 when the Gujarat Vacant Land in Urban Areas Prohibition Alienation Act, 1972 ceased to remain in force, the plaintiffs asked the defendants to execute the sale deed. The plaintiffs were ready and willing to perform their part of the contract but the defendants did not perform their part of the contract and failed to execute the sale deed and thereby committed breach of the contract and defendants nos.1 to 7 tried to sell the land to other persons. Consequently, the plaintiffs published a notice in daily newsppare "Gujarat Samachar"on 16.11.1975 indicating their intention to purchase the land and disclosing the agreement to sell subsisting in their favour. Thereafter Urban Land (Ceiling & Regulation) Act, 1976, came into force on 17.2.1976. The plaintiffs asked the defendants to obtain the requisite permission from the competent authoirty under this Act to execute the sale deed but the defendants did not obtain any such permission. Accordingly, suit was filed by the plaintiffs against the defendants claiming specific performance of the agreement to sell, handing over of possession, refund of earnest money amounting to Rs.20,000/- and damages amounting to Rs.75,000/- with interest at the rate of 9% per annum.

4 The defendants nos.1,k 2, 4, 6 and 7 in their written statement contested the suit inter alia on the ground that the suit is not maintainable, that the suit is time-barred and that there is no privity of contract

between them and the plaintiffs hence the plaintiffs are not entitled to relief under Specific Relief Act or even in the alternative they cannot claim refund of the earnest money nor they can claim damages from them. It is also pleaded that the defendants nos.2 and 3 being minors, the alleged agreement to sell is not binding on them. They have also deneied execution of the agreement to sell and pleaded that it was in connection with money lending transaction.

5. Defendants nos.8 to 12 despite service of summons on them remained absent. Hence, the suit proceeded against them ex parte.

6. The trial Court found that the defendants nos.1 to 4 and Parshottamdas Babarbhai Patel executed an agreement to sell dated 29.11.1971 in favour of the defendants nos.8 to 12. It further found that the defendants nos.8 to 12 executed agreement to sell dated 23.5.1972 in favour of the plaintiffs and accepted Rs.20,000/- towards earnest money. It further found that the writings in the nature of supplementary agreement dated 17.11.1972, 18.12.1972 and 13.7.1973 were proved to have been executed as alleged by the plaintiffs. The trial Court however found that the plaintiffs failed to establish their readiness and willingness to act in accordance with the terms of the contract, hence, they are not entitled to the specific performance of the contract. Regarding refund of the earnest money the trial Court found that in the alternative the plaintiffs are entitled to refund of Rs.20,000/- as eanrest money only from the defendants nos.8 to 12. It was further found by the trial Court that the plaintiffs are not entitled to damages amounting to Rs.75,000/- because the contract itself was void. On the plea of limitation, the trial Court found that the suit was within limitation. It repelled the defendants' plea that the contract is not binding upon the defendants nos.2 and 3. The trial Court further found that the suit is not maintainable against defendants nos.5 to 7. The last finding of the trial Court regarding binding nature of the agreement dated 23.5.1972 on the defendants nos.1 to 7 has been in negative. With these findings, the aforesaid judgement and decree was passed by the trial Court against which the present appeal has been filed.

7 In this appeal, the defendants nos.2 and 3 2ho were minors have been deleted. The defendant no.5 died during the pendency of the suit and her legal representatives were brought on record. Likewise, the defendant no.10 also died during the pendency of the suit

and his legal representatives were brought on record. Respondent no.13 was impleaded during the pendency of the appeal alleging that subsequent agreement to sell was executed by the defendants nos.1 to 7 in his favour.

8 During the pendency of the appeal, learned counsel for the respondent no.13 stated that he has received the earnest money as well as the sale consideration from the remaining defendants and that he will not press anymore the agreement to sell executed in his favour. Similar statement was given by the other contesting respondents. Consequently, none appeared on behalf of the respondent no.13 at the time of hearing of appeal.

9 The defendants nos.8 to 12 neither appeared before the trial Court nor before this Court in this first appeal. As such, Shri P.V. Nanavati, learned counsel for the appellant and Shri M.M. Desai, learned counsel for the respondents nos.1 to 7 with consequent deletion of respondents nos.2 and 3 were heard and the record was examined.

10 I find substance in the contention of Shri P.V. Nanavati that the trial Court has not recorded finding with reasons that the plaintiffs were not ready and willing to perform their part of the obligation under the contract. Consequently, this could not be a ground for dismissing the suit for specific performance of the agreement to sell. A casual finding has been recorded by the trial Court that "even if we presume for the sake of arguments that the plaintiffs were ready and willing to perform their part of the contract, they cannot enforce a void contract." As such, the finding of the trial Court that the plaintiffs were not readyand willing to perform their part of the contract is without any evidence and reasoning and such finding cannot be sustained. From the evidence on record it transpires that the plaintiffs were ready and willing to peform their part of obligation under the contract and when they came to know that the property was going to be sold to some other person they gave public notice in daily newspaper Gujarat Samachar on 16.11.1992, which shows that the existence of the agreement to sell in their favour was disclosed and the public was warned not to purchase the property. There is nothing on record to show that the plaintiffs were not ready and willing to perform their part of the contract. As such, this finding of the trial Court is against the evidence on record and is also without any evidence and reason and the same is required to be quashed and set aside. The finding of the trial Court regarding the

limitation of the suit was not challenged by the learned counsel for the respondent. In view of the extended period given in the supplementary agreement to sell, the trial Court rightly concluded that the period of limitation will be computed from 12.11.1975 inasmuch as The Vacant Land in Urban Areas (Prohibition of Alienation) Act ceased to remain in force with effect from 12.8.1975. The suit was filed on 16.4.1977. It was thus a suit within limitation and the trial Court was justified in holding that the suit was within the period of limitation. There is clear averment in para 8 of the plaint that the plaintiffs were and are always ready and willing to act as per the said agreement and they had informed this fact often to the defendants. There is thus averment in the plaint regarding the plaintiffs' readiness and willingness to perform their part under the contract and also there is evidence to that effect from the side of the plaintiffs. There was thus effective compliance of the provisions of Section 16(c) of the Specific Relief Act.

11. The trial Court has rightly held from the evidence on record that the defendants nos.1 to 4 and Parshottam Babarbhai Patel had executed the agreement to sell dated 29.11.1971 in favour of the defendants nos.8 to 12 stipulating to execute the sale deed within a year by making title clear. The trial Court has rightly repelled the case of the defendants that it was not an agreement to sell rather it was a money lending transaction. From the agreement to sell nothing is indicated that it was a money lending transaction nor the ingredients ofloan given and taken are flowing from the said agreement. Consequently, the findingof the trial Court on issue no.1 requires no interference and it is confirmed.

12 Similarly, the findings of the trial Court that the defendants nos.8 to 12 had executed an agreement to sell dated 23.5.1972 stipulating to clear title by 20.11.1972 and had accepted Rs.20,000 towards earnest money isalso justified from the evidence on record and this finding could not be challenged by the learned counsel for the respondents. Consequently, the findings of the trial Court on issue no.2 have also to be confirmed.

13. Likewise, the trial Court has rightly concluded from the evidence on record that the writings dated 17.11.1972, 18.12.1972 and 13.7.1973 were duly executed. Through these writings the period for execution of the sale deed was extended. These are in the nature of

supplementary agreements. As such no interference on findings of the trial Court on issue no.3 is likewise required.

14. For the reasons given above, the finding of the trial Court on issue no.4 regarding the plaintiffs' readiness and willingness to perform their part of the obligation under the contract is set aside.

15. Findings of the trial Court on issue no.8 had been confirmed in the foregoing portion of the judgement where it has been held that the suit is not barred by limitation.

16 The trial Court has rightly concluded that the agreement in question is binding on the defendatns nos.2 and 3. It has come in evidence that the property was ancestral in the hands of Parshottam Babarbhai Patel. The defendants nos.2 and 3 though minors were coparceners in the joint hindu family and as such the action of the karta of the Joint Hindu Family in executing the agreement to sell will bind them. There is no evidence on record that hte action of the Karta was not for legal necessity or for the benefit of the minors. As such the finding of the trial Court on issue no.9 also requires no interference. It is further clear that the agreement to sell is binding on defendants nos.2 and 3. Moreover, these defendants were deleted subsequently. Consequently, such finding becomes redundant.

17 The trial Court has rightly held that the suit is maintainable against the defendants nos.5 to 7. They also being members of the coparcenery and joint hindu family are bound by the action of the karta. As such findings of the trial Court on isue no.11 also require no interference.

18 The case of the respondents nos.1 to 7 inter alia was that the subsequent agreement dated 23.5.1972 between the defendants nos.8 to 12 and the plaintiffs is not binding on them because they were not parties to it. Shri M.M. Desai has argued that there is no privity of contract between the plaintiffs and the defendants nos.1 to 7, hence, the contract cannot be specifically enforced. Likewise, he has contended that no earnest money was taken by the respondents nos.1 to 7 from the plaintiffs, hence, they are not liable to refund any earnest money to the plaintiffs. Likewise, he contended that in the absence of privity of contract between the plaintifss and these respondents, the plaintiffs cannot claim any damages for breach of contract against these

respondents. The trial Court under issue no.12 has held that the agreement dated 23.5.1972 is binding ont he defendants nos.1 to 7. This finding cannot be assailed for the obvious reason that here was one of the conditions in the agreement to sell dated 29.11.1971 executed by the defendants nos.1 to4 and Parshottamdas Babarbhai Patel that they will execute the sale deed in favour of the defendants nos.8 to 12 or 12 direct. Consequently, the agreement dated 23.5.1972 between the plaintiffs and defendants nos.8 to 12 is binding upon the defendants nos.1 to 7. As such, the findings of the trial Court on issue no.12 hardly requires any interference which is hereby confirmed.

19 Now the first point for consideration in this appeal whether the plaintiffs are entitled to get a decree for specific performance of agreement to sell. The trial Court found that the plaintiffs are not entitled to decree for specific performance of contract. Several grounds had been given by the trial Court in support of its conclusion. Those findings and reasonings have been assailed by Shri P.V. Nanavati, learned counsel for the appellants.

20 Before appreciating the contentions raised by Shri Nanavati, it has to be seen whetehr the affidavit and annexures annexed to the affidavit (page no.61) dated 11.8.2000 can be admitted in evidence in this appeal. Needless to say that there is no application under Order 41 Rule 27 of CPC by the appellant seeking permission to adduce additional evidence in the nature of affidavit and domentary evidence in appeal. Except the provision of Order 41 Rule 27 of CPC there is no other provision in the CPC under which appellant can as of right tender affidavit or additional documentary evidence. Mere tender of such document or affidavit does not amount that it has been admitted as additional evidence unless an application under Order 41 Rule 27 of CPC is moved and ingredients of the siad Order are satisfied and the permission of the Court is obtained for filing additional evidence, the appellant cannot as of right file additional evidence in appeal. Even by moving an application under Order 41 Rule 27 of CPC the appellant cannot be permitted to file additional evidence as of right. Such additional evidence can be accepted only on three grounds mentioned in Order 41 Rule 27 of CPC. It has not been disclosed in the affidavit as to why the documents tendered could not be filed earlier. Similarly it is not alleged that these documents were tendered during trial but were rejected. Likewise, it is not disclosed in the affidavit that the additional evidence

will help the appellate Court in pronouncing the judgement. Additional evidence cannot be admitted for filling in lacunae in the case of a party. If the appellate Court thinks that for removal of any lacunae in evidence some additional evidence, may be oral or documentary, is required then it can permit such additional evidence to be brought on record and that too for pronouncing effective judgement by the appellate Court. Shri Nanavati has referred to the Supreme Court pronouncement in M.M. QUASIM V. MANOHAR LAL SHARMA AIR 1981 SC 1113. However, this case does not help Shri Nanavati that he can adduce additional evidence in appeal without moving an application under Order 41 Rule 27 of CPC. Even in this it was laid down by the Apex Court that application under Order 41 Rule 27 of CPC has to be moved and application so drawn up and affidavit sworn is sufficient compliance of ORder 41 Rule 27 of CPC. Thus, firstly there is no application under Order 41 Rule 27 of CPC, hence, additional evidence cannot be accepted. Moreover, the evidence on record is sufficient to pronounce effective judgement hence also additional evidence cannot be permitted to be taken on record. Thirdly, there is no lacuna in the evidence on record hence also additional evidence cannot be permitted.

21 One of the contentions of Shri Nanavati was that time is not of the essence of the contract and therefore decree for specific performance could not have been refused by the trial Court. The trial Court has not considered this aspect of the matter whether the time was of the essence of the contract or not. However, the law on the subject has been clarified by the Apex Court in its two decisions. In Govind Prasad Chaturvedi v. Hari Dutt Shastri reported in AIR 1977 SC 1005 the Supreme Court has laid down that where time is not of the essence of the contract and the plaintiff is ready and willing to perform his part of the contract the decree for specific performance of the contract has to be granted.

22 In M/s Hind Constructions, Contractors v. State of Maharashtra AIR 1979 SC 720 the Apex Court has laid down that the question whether or not time was of the essence fot he contract would esentially be a question of the intention of the parties to be gathered from the terms of the contract. Even where parties have expressly provided that the time is of the essence of the contract, such stipulation will have to be read along with other provisions of the Contract and such other provisions made on construction of the contract excluding the inference that the completion of the work by the particular date was intended to be fundamental. Thus, according to the

Apex Court, the question whether time was of the essence of the contract is to be decided with reference to the intention of the parties and also with reference to the agreement between the parties. The intention of the parties is therefore primary consideration for determining whether the time was of the essence of the contract or not.

23 In CHAND RAVI V. KAMAL RAVI AIR 1993 SC 1742 the Apex Court has held that in the case of sale of immovable property there is no presumption as to the time being the essence of the contract. Even if it is not the essence of the contract, the Court may infer that it is to be peformed in a reasonable time if the conditions are (i) from the express terms of the contract, or (ii) from the nature of the property and (iii) from the surrounding circumstances, for example, the object of making the contract.

24 In the light of the afoersaid guidelines evidence on record has been examined and it is found that the time was not of the essence of the contract and the parties never intended that the time shall be the essence of the contract. No doubt, time limit has been prescribed in the agreement to sell but there was further stipulation that necessary permission under the Bombay Tenancy and Agricultural Lands Act was to be obtained and that subsequent supplementary agreements were also executed on 17.11.1972, 18.12.1972 and 13.7.1973 extending the period during which the sale deed was to be executed. Naturally, some time was required for obtaining permission from the competent authorities and in view of these and supplementary agreements it can be held that the time was not of the essence of the contract. Moreover, the suit was not dismissed by the trial Court on the ground that time was of the essence of the contract. Hence this contention on the facts and circumstances of the case has only an academic value.

25 On the point of seeking permission of the competent authority under Section 63 of the Bombay Tenancy Act and under Urban Land (Ceiling & Regulation) Act, 1976, Shri Nanavati contended that the judgement of the trial Court is erroneous and even if permissions under these Sections were not obtained, conditional decree for specific performance of contract could have been granted. He further contended that reliance of the trial Court on the judgement of this Court reported in 19 GLR 920 does not hold water in view of the subsequent Full Bench pronouncement of this Court in Shah Jitendra

v/s Patel Laljibhai reported in 1984 (2) GLR 1001. In this case two questions were referred to the Full Bench. The first question was not considered necessary for answer on the facts and circumstances of the case. While answering the second question referred, the Full Bench held that a conditional decree for specific performance subject to exemption being obtained u/s 20 of the Urban Land (Ceiling & Regulation) Act, 1976 is permissible. Placing reliance upon this Full Bench verdict, Shri Nanavati contended that the trial Court had fallen in error in refusing to grant at least conditional decree for specific performance subject to obtaining permission u/s 20 of the ULC Act. It may however be mentioned at this stage that out of the two plots one plot was in the agricultural zone governed by the Bombay Tenancy and Agricultural Lands Act for which application exh.100 was moved by Parshottamdas Babarbhai on 1.6.1972 to Prant Officer, Viramgam, for granting permission to sell plots nos.234/2 and 236/2 to the plaintiffs. The judgement of the trial Court records that the Prant Officer had refused to grant permission to sell the land vide exh.87 dated 29.8.1972. If this is so, then, even if the conditional decree would have been passed in respect of other plot after seeking permission u/s 20 of the ULC Act, the question is whether specific performance of part of the contract could be granted conditionally. Section 12 of the Specific Reliefs Act provides that except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract where a party to a contract is unable to perform the whole of his part of it but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may at the suit of either party direct the specific performance of so much of the contract as can be performed. In agreement to sell there were two plots, namely, 236/2 admeasuring 6292 sq. yards and 234/2 admearsuirng 1694 sq. yards. Consequently, decree for part performance of the contract on the facts and circumstances of the case was not possible and is not possible even in this appeal. Consequently, the Full Bench verdict relied upon by Shri Nanavati does not entitle him for a conditional decree for specific performance either of the entire agreement or part of the agreement to sell.

26 Shri Nanavati further contended that the trial Court had fallen in error in holding that the supplementary agreements are in the nature of void agreements and against public policy and the provisions of law and such uncertain contracts could not be

enforced. His contention has been that time for execution of the sale deed was extended because of prohibition contained in Gujarat Vacant Land Urban Areas Prohibition of Alienation Act, 1972 and since this Act ceased to be in force after 12.8.1975, the agreement cannot be said to have become void. It may be mentioned that on the facts and circumstances of the case, the extended period during which the sale deed was to be executed after expiry of Gujarat Vacant Land Urban Areas Prohibition of Alienation Act, 1972, certainly rendered the contract uncertain. The initial agreement to sell was executed by Parshottamdas Babarbhai on 29.11.1971. Supplementary agreement exh.98 was executed on 17.11.1972 and another supplementary agreement exh.99 was executed on 13.7.1973. According to the last supplementary agreement the time limit of the agreement was extended for a period of three months after the provisions of Gujarat Vacant Land Urban Areas Prohibition of Alienation Act 1972 ceased to be in force. It was uncertain in the minds of the parties as to when the provisions of the Gujarat Vacan Land Urban Areas Prohibition of Alienation Act 1972 shall cease to be in force. Consequently, the terms in the supplementary agreement were uncertain which renders the contract uncertain and such uncertain contracts depending upon the happening of uncertain events could not be specifically enforced. In this view of the matter, it can be said that uncertain contract in its nature which cannot be determinable and which cannot be enforced in view of the provisions of Section 14(1)(c) of the Specific Relief Act could not be specficially enforced. The trial COurt was therefore justified in refusing to grant decree for specific performance though for inadequate reasons.

27 The next contention of Shri Nanavati was that the Trial Court fell in error in holding that permission under Section 63 of the Bombay Tenancy and Agricultural Lands Act was required. The defendants no. 1 to 5 applied for permission on 1.6.1972 vide exh.100 but the same was refused by the Prant Officer, Viramgam, on 29.8.1972. It is difficult to accept the contention that in the year 1972 the provisions of Section 63 of the Bombay Tenanct Act were not applicable. At that time Urban Land (Ceiling & Regulation) Act, 1976, was not in operation. Consequently, Parshottamdas Babarbhai was justified in moving an application for permission under Section 63 of the Bombay Tenancy Act in respect of the two plots nos.234/2 and 236/2 to the Prant Officer. Since his application was rejected by the Prant Officer, the agreement to sell could not be the basis for executing a sale deed in pursuance of the said agreement

to sell. In this view of the matter also, the trial Court was justified in refusing to grant decree for specific performance.

28 Even if on one ground the trial Court was justified in refusing to pass the decree for specific performance, normally, there should not be any occasion for disturbing the judgement and decree of the trial Court. However, Shri Nanavati contended that appeal is a continuation of the suit and as such in appeal the judgement and decree of the trial Court can be set aside taking into consideration subsequent events. There can be no dispute about the contention of Shri Nanavati that the appeal is a continuation of the suit. Likewise, there can be no dispute that subsequent events could be considered by the trial Court if those events occurred during the pendency of the trial. Likewise, if certain subsequent events occurred after conclusion of trial and during the pendency of the appeal, those events can be considered by the appellate Court as well. Such subequent events may be factual events or legislative events, and both such subsequent events can be considered by the appellate Court inasmuch as appeal is continuation of the suit. In LACHMESHWAR V. KESHWAR LAL AIR 1941 Feder Court 5 the Federal Court observed that hearing of an appeal under the procedural law of India is in the nature of rehearing and therefore in moulding the relief to be granted in a case on appeal the appellate Court is entitled to take into account even facts and events which have come into existence after passing of the decree appealed against. Consequently, the appellate Court is competent to take into account the legislative changes after the decision in the suit was given and its powers are not confined only to see whether the lower court's decision was correct, according to law as it stood when the decision was given.

29 The Supreme Court in P. VENKATESHWARLU V. MOTOR AND GENERAL TRADERS AIR 1975 SC 1409 has held that even in revision under Section 115 of CPC the revisional Court can take cognizance of subsequent events. It was observed that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.

30 In this appeal no factual subsequent events took place after the judgement under appeal was delivered. Of

course, certain legislative changes took place. For instance, ULC Act, 1976, has now been repealed and as on the date the said Act is not in force. Consequently, it will be deemed that all the provisions of ULC Act, 1976, are repealed and are not in existence. Consequently, there is no requirement for obtaining the permission now of the competent authority under the ULC Act.

31 So far as the permission under the Bombay Tenancy Act is concerned, it was already applied for by the respondents nos.1 to 5 within a period of one year from the execution of the agreement to sell which was refused by the Prant Officer, as disccused in the forgoing portions of this judgement. In this view of the matter, the respondents nos.1 to 5 or, for that matter, the respondents nos.1 to 7 are not required to approach again and file application for permission u/s 63 of the Bombay Tenancy Act. Shri Nanavati, has however argued regarding legislative changes in Section 63 of the Bombay Tenancy Act so far as it applies to Gujarat State with reference to the Gujrat Town Planning and Urban Development Act, 1976. Section 63 of the Bombay Town Planning Act provides that save as provided in this Act, (a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any or interest therein, or (b) no mortgage of any land or interest therein in which the possession of the mortgaged property is delivered to the mortgagee or (c) no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein, shall be invalid in favour of a person who is not an agriculturist or who being an agriculturist cultivates personally and not less than the ceiling area whether as an owner or tenant or partly as owner and partly as tenant or who is not an agricultural labourer. The proviso to this section further empowers the Collector or an officer authorised by the State Government in this behalf who may grant permission for such sale, gift, exchange, lease or mortgage on conditions as may be prescribed. Prant Officer was certainly an officer authorised to grant permission under this Section and he had already refused to grant such permission to the respondents nos.1 to 5. Consequently, in view of this provision, the agreement to sell executed at the first stage, namely, by the respondents nos.1 to 5 in favour of the defendants nos.8 to 12 will not be valid, so also the second agreement executed by the defendants nos.8 to 12 in favour of the plaintiffs. The trial Court has observed that the defendants nos.8 to 12 as well as the plaintiffs are not

agriculturists. This conclusion was reached from the evidence on record.

32 Shri Nanavati however contended that during the pendency of the suit, Gujarat Town Planning and Urban Development Act, 1976 was well in operation and Section 121 of this Act provided that the provisions of Tenancy Act not to apply to areas under town planning schemes. In view of this provision, the provision of Bombay Tenancy Act will not apply to the area which is included in the scheme of Gujarat Town Planning and Urban Development Act. This section was, however, deleted by Gujarat Act No.4 of 1986 with effect from 12/06/1985. He therefore contended that the provisions of Gujarat Town Planning Act, 1976 were in operation when the judgement was delivered in the year 1984 and Section 121 was deleted only with effect from 12/06/1985 and as such no permission was needed. However for this, two things have to be seen. First is whether it has been established from the evidence on record that these plots which were subject matter of the agreement to sell were actually included in the Town Planning Scheme. The trial Court has observed from the evidence on record, namely, the statements of two witnesses of the plaintiffs that the two plots were situated in agricultural zone and the Town Planning Scheme was not approved by the State Government. For this he has placed reliance on the statement of PW No.2 - Kirtikumar R Shah. He was serving as Asst. Town Planning OFficer in AUDA. He stated that he brought the map and record of the suit lands and the nearby lands. The map which was sent by his office to the State Government for sanction on 18.1.1983 was pending in the Government and no sanction was given so far. His statement was recorded on 12.12.1983. He further stated that the land of Survey No.236 is not coming in residential zone and it is situated in agricultural zone. Likewise, he stated that out of the land of Survey No.234 some land is of residential zone and some is in agricultural zone. PW No.3 Hasmukhbhai Patel has likewise stated that the suit land is in the agricultural zone and as such it cannot be sold to any person other than an agriculturist without permission u/s 63 of the Bombay Tenancy Act. Thus, it is doubtful even from the plaintiffs' evidence that the two plots which were under the agreement to sell came within the Town Planning Scheme on the relevant date. As such, bar of Section 63 of the Bombay Tenancy Act could not be lifted.

33 As mentioned earlier, Section 121 of the Gujarat Town Planning and Urban Development Act was deleted with effect from 12/06/1985. Its effect will be that

thereafter the provisions of Section 63 of the Bombay Tenancy Act will apply to the disputed land and since permission for sale was refused by the competent authority, sale deed could not be executed. Thus, in my opinion, even the subsequent events will not help the plaintiffs in getting the decree for specific performance.

34 It is relevant to point out at this stage whether the discretion should be exercised in refusing to grant decree for specific performance in view of Section 20 of the Specific Relief Act. Section 20 prescribes that jurisdiction to decree suit for specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. But the discretion of the Court is not arbtirary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Thus, what is provided under Section 20(1) of the Specific Relief Act is that the jurisdiction of a Court to decree the suit for specific performance is discretionary. However, the discretion has to be exercised judicially based on sound and settled judicial principles and it should not be arbitrarily exercised. Sub-section (2) of Section 20 gives certain illustrations in which the Court may properly exercise the discretion not to decree a suit for specific performance. Three illustrations have been given in this Section where decree for specific performance can be refused. One of such situations is contemplated u/s 20(2)(c) of the Specific Relief Act which says that where the defendant entered into the contract under circumstances which do not render the contract voidable, but, makes it inequitable to enforce specific performance. In my opinion, it is inequitable to grant a decree for specific performance for the obvious reason that the first agreement executed in favour of defendants nos.8 to 12 was executed by Parshottamdas Babarbhai and defendants no.s 1 to 4 on 29.11.1971. The second agreement was executed by the defendants nos.8 to 12 in favour of the plaintiffs on 25.3.1972. The question is whether it is equitable in this appeal to grant a decree for specific performance of an agreement to sell after a lapse of 28 or 29 years of the agrement to sell on the same terms and conditions under which the agreements were executed. Judicial notice can be taken that during three decades the prices of the land have gone high and it would be inequitable to compel the defendants - respondents to execute the sale deed on the same terms and conditions contained in the original agreements. It is also inequitable to decree the suit for specific performance because even the

plaintiffs had claimed damages to the tune of Rs.75,000/which indicates that they have admitted increase in the prices of land. If they have claimed damages at Rs.75,000/- in addition to the refund of earnest money with interest, it is inequitable to grant a decree for specific performance on the same consideration which is mentioned in the agreement to sell. The possession of the land remained with the respondents nos.1 to 7 during all these years. There is no dispute about it because decree for delivery of possession has also been claimed by the plaintiffs.

35 The case of MADAMSETTY SATYANARAYANA v/s G. YELLOJI RAO reported in AIR 1965 SC 1405 relied upon by Shri Nanavati does not entitle him to a decree for specific performance. The discretion is being exercised in this appeal reasonably and in accordance with settled judicial principles and not arbitrarily.

36 In view of the foregoing discussions, I am of the view that the plaintiffs are not entitled to decree for specific performance of the agreement to sell merely because of their readiness and willingness to perform their part of the contract. As discusssed above, the contract has become determinable, hence, no decree for specific performance can be granted. Further in view of bar of Section 63 of the Bombay Tenancy and Agricultural Lands Act, no decree for specific performance of the agreemnt could be granted. Subsequent events, namely, legislative changes also do not entitle the plaintiffs to a decree for specific performance and lastly it is inequitable to grant a decree for specific performance on the facts and circumstances of the case.

37 The next question for consideration is whether the plaintiffs are entitled to refund of earnest money and if so from which of the defendants. The trial Court has held that the plaintiffs are entitled for refund of the earnest money paid by them to defendants nos.8 to 12 from these defendants and not from the defendants nos. 1 to 7. Shri Desai, learned counsel for the respondents nos.1 to 7 contended that in the absence of privity of contract and further because no earnest money was received by these respondents, they are not liable to refund any earnest money to the plaintiffs. However, I am not convinced with these contentions of Shri Desai. It has already been indicated in the foregoing portion of the judgement that the defendants nos.1 to 7 were bound to execute the sale deed in favour of the defendants nos.8 to 12 or to any person to whom the defendants nos.8 to 12 desired to execute the sale deed. Not only that

the defendants nos.8 to 12 received the earnest money from the plaintiffs but the defendants who are executants of first agreement to sell dated 17.11.1972 also received earnest money from the defendants nos.8 to 12 in two installments of Rs.2,000/and Rs.5,000/-. As such, in my opinion, the trial Court was in error in refusing to grant the decree for refund of earnest money against the respondents nos.1 to 7. It is however clarified that the decree for refund of earnest money amounting to Rs.20,000/- together with interest at the rate of 12% per annum shall be joint decree against the respondents and in case the plaintiffs proceed to execute this decree against the respondents nos.1 to 7, these respondents will be entitled to proceed against the respondents nos.8 to 12 for the recovery of the balance amount. The decree is against all these respondents and the respondents nos.8 to 12 shall be jointly and severally responsible.

38. Shri Nanavati further contended that the trial Court was in error in refusing to grant decree for damages amounting to Rs.75,000/claimed by the plaintiffs for breach of contract. Section 21 of the Specific Relief Act provides that in a suit for specific performance of the contract the plaintiffs may also claim for compensation for its breach either in addition to or in substitution of such performance. Sub-section (4) of Section 21 provides that in determining the amount of any compensation awarded under this Section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872. I have examined the allegations made in the plaint as well as the statements of the plaintiff Gunvantlal Ratanchand, recorded by the trial Court. In the plaint the amount of compensation has been disclosed in lumpsum. If the compensation is to be worked out in accordance with Section 73 of the Indian Contract Act, then in such cases, the compensation should be the difference between the market price of the land as on the date of the agreement to sell and as on the date of breach of contract. It is not a case of breach of contract, hence, section 73 of the Indian Contract Act will not apply. More over in view of absence of specific evidence as to what compensation should be awarded to the plaintiffs, their abrupt claim for Rs.75,000/- cannot be accepted. As such, I dont find force in this argument of Shri Nanavati.

39 It may be mentioned that the plaintiffs have claimed interest at the rate of 9% per annum whereas the trial Court has granted interest at the rate of 12% per annum. As such the decree of the trial Court regarding

interest on earnest money also requires no interference because no cross objection on the point has been filed by the respondents.

40 In the result, the appeal succeeds in part only. The judgement and decre of the trial Court is confirmed with the modification that the plaintiffs are entitled to recover Rs.20,000/- as earnest money from all the respondents together with interest at the rate of 12% per annum from the date of the suit till realisation. In the circumstances of the case, the parties shall bear their own costs of this appeal.

*** sd/-

(mohd)